

RESPONSE UNDER 37 C.F.R. § 1.116 AND  
STATEMENT OF SUBSTANCE OF INTERVIEW  
Attorney Docket No.: Q79528  
Application No.: 10/809,449

**REMARKS**

Claims 1-10 are all the claims pending in the application.

**I. Preliminary Matter**

As a preliminary matter, Applicant thanks the Examiner for acknowledging the claim to foreign priority and for confirming that the certified copy of the priority documents was received.

**II. Summary of the Office Action**

The Examiner withdrew the rejections under 35 U.S.C. § 112, first paragraph and under 35 U.S.C. § 101. The Examiner, however, maintained the prior art rejections as well as rejected new claims under the same grounds. Specifically, claims 1-10 are rejected under 35 U.S.C. § 102/103.

**III. Statement of Substance of Interview**

The interview was administrative in nature. That is, Applicant called the Examiner because the Office Action appeared to be incomplete in that it indicated that claims 1-8 are rejected under 35 U.S.C. § 102/103 (*see* page 3 of the Office Action). The Examiner indicated that claims 9 and 10 are also rejected under same grounds (*see* pages 3 and 13-14 of the Office Action). No prior art references were discussed during the Interview.

It is respectfully submitted that the instant STATEMENT OF SUBSTANCE OF INTERVIEW complies with the requirements of 37 C.F.R. §§1.2 and 1.133 and MPEP §713.04.

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IV. Prior Art Rejections

Claims 1-10 are rejected under 35 U.S.C. § 102(e) as being anticipated by or in the alternative, under 35 U.S.C. § 103(a) as being obvious over WO 00/13376 to Nelson (hereinafter “Nelson”). Applicant respectfully traverses these grounds of rejection at least in view of the following exemplary comments.

*A. Nelson does not disclose or suggest “wherein a node has at least a first receive port and a second receive port... at the first receive port, receiving a first data telegram... at the second receive port, receiving a second data telegram...,” as set forth in claim 1*

In the Amendment under 37 C.F.R. § 1.111 filed on October 26, 2007, Applicant argued that Nelson’s nodes do not have a first receiving port and a second receiving port as set forth in claim 1. In response, the Examiner contends that two separate paths correspond to two different ports. The Examiner further contends that such interpretation is reasonable (*see* page 14 of the Office Action). Applicant respectfully disagrees.

Applicant respectfully submits that by simple claim language differentiation, Nelson’s paths cannot be both “at least one redundant network path” and “the first receive port [and] the second receive port.” Applicant further notes that packets from different paths can be received at the same port in the node. In other words, Applicant respectfully notes that Nelson is silent with respect to the channel/path’s endpoint. In short, Nelson does not disclose or suggest the first and second receiving ports. Accordingly, Applicant respectfully submits that the position set forth in the Office Action is unreasonable and inaccurate.

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**B. Nelson does not disclose or suggest “if the first timer value and the second timer value are not identical, overwriting the address space and the stored first timer value of the first data telegram with user data of the second data telegram and with the second timer value of the second data telegram...,” as set forth in claim 1**

In response to Applicant’s arguments that Nelson lacks a) timer values, b) comparing the two timer values, and c) overwriting a memory space with the second data telegram when the two timer values do not match, the Examiner attempts to further clarify his position and alleges that the timer values correspond to both packet identifiers and arrival time. That is, on page 15, in ¶ 20 of the Office Action, the Examiner alleges that Nelson’s packet identifiers are timer values set forth in claim 1 and yet on page 15, in ¶ 18 of the Office Action, the Examiner alleges that Nelson’s arrival times are timer values set forth in claim 1. Applicant respectfully submits that the packet identifier and arrival time are two separate values. That is, Applicant respectfully notes the apparent inconsistency in the Office Action, in that the timer values set forth in claim 1 cannot be the packet identifier for one feature and at the same time, the arrival time for the other feature of this same claim.

Packet Identifiers: Nelson only discloses comparing identifiers of the packet (col. 10, lines 15 to 22). In Nelson, there is no disclosure or even remote suggestion that the identifiers are time values at which the packet is received, as required by claim 1. Nelson recites: “[t]he identifier allows the receiving node to determine which packets are duplicate...the identifier is a packet number” (page 9, line 30 to page 10, line 2). In short, in Nelson, the identifiers of the packet are not the time values at which the packet is received. Also, if Nelson’s packet identifiers correspond to the timer values, then Nelson does not disclose or suggest the packet identifiers as set forth in claim 1. In short, Nelson only discloses a packet identifier and does not disclose or suggest the packet identifier being the arrival time value for each packet.

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Arrival Times: Nelson further discloses that if the comparison of identifiers indicates that the packet is a duplicate packet, the receiver will then record the arrival of the duplicate packet and other information related to the arrival of the duplicate packet (col. 10, lines 8 to 22). In other words, in Nelson, the arrival information is not being compared with the arrival information of other packets to determine if the packet is a duplicate. On the contrary, the arrival information is recorded after it is determined that the packets are duplicates. In Nelson, the arrival information is used for “reporting to a system operator, compilation of statistics, or storage in a list or database of another system” (page 10, lines 19 to 20). In other words, contrary to the Examiner’s allegation, Nelson clearly does not disclose or suggest comparing the arrival information.

Overwriting the address space: claim 1 recites, *inter alia*: “in a memory of the node, storing user data of the first data telegram in an address space that is assigned to the identifier... overwriting the address space and the stored first timer value of the first data telegram with user data of the second data telegram and with the second timer value of the second data telegram.” The Examiner is merely speculating that the first timer value will be 0 because it did not arrive and the second timer value will replace the first timer value (*see* page 15 of the Office Action). Applicant respectfully notes that since Nelson is silent regarding the address space, the rejection is improper as it lacks the “sufficient specificity”/suggestion required under 102/103.

Applicant further respectfully notes that if the first packet never arrived then it cannot be stored in the address space, as set forth in claim 1. In other words, Applicant respectfully submits that the Examiner’s interpretation is inconsistent. Applicant respectfully notes that

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Nelson fails to disclose or even remotely suggest overwriting the address space that stores the received first datagram with the received second datagram.

**C. Nelson does not disclose or suggest “wherein a respective one of the first and second timer values...corresponds to a cycle number of an isochronous cycle during which the respective one of the first and second data telegrams is received,” as set forth in claim 1**

The Examiner further clarifies his position by alleging that “since the data telegrams are received in an Ethernet communication system (page 5, line 2), the received arrival times can be timestamps according to the receiver’s cycle number within an isochronous cycle” (see page 5 of the Office Action). From the tenor of the grounds of rejection, it would appear that the Examiner has decided, even though no anticipatory or particularly relevant reference has been found, that the present invention is too simple to be deserving of a patent. As a result, the Examiner has formulated grounds of rejection which, at first blush, appear to be based on actual prior art disclosure, but instead are based on mere speculation. Specifically, page 4, line 31 to page 5, line 3 of Nelson recites: “[i]n various embodiments, the connections between the nodes include, but are not limited to such communications technologies as voice-band modems, RS-232 serial, xDSL, ISDN, Ethernet, Firewire, ATM, DS-1/E-1, GR-303, and SONET/SDH connections.” Accordingly, the Office Action ignores this express disclosure in Nelson.

Furthermore, Applicant respectfully notes that the Examiner’s position/speculation contradicts Nelson’s disclosure. In particular, Nelson discloses obtaining statistics on arrival information of duplicate packets transmitted via different paths (page 10, lines 7 to 23). In other words, the packets are probably transmitted at substantially the same time and their arrival information is being monitored to determine information about various paths. Accordingly, if the arrival information would correspond to the cycle number (as alleged in the Office Action), the

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arrival information would not provide information about how long the duplicate packet arrived after the first packet, as explicitly disclosed in Nelson (page 10, lines 14 to 17).

Furthermore, as indicated above, the Examiner's position is based on mere hindsight and not substantiated by any evidence of record. There are several reasons why, on the present record, the Patent Office can, and indeed must, grant Applicant's application for a patent. First, as noted in MPEP § 2141, "Office policy has consistently been to follow Graham v. John Deere Co. in the consideration and determination of obviousness under 35 U.S.C. § 103." Grounds of rejection based on a rationale such as the one just described distort each of the Graham factual inquiries, and produce a distorted determination as a result. Since the rationale is not rooted in actual prior art, productive discussion regarding the true scope and content of the prior art is no longer feasible. This, in turn, renders it impossible to clearly ascertain the actual differences between the prior art and the claims at issue. Also, since the rationale is a purely hypothetical construct, it is by its very nature a creature of hindsight, which makes any advance over the art appear trivial.

In short, Applicant respectfully submits that the position set forth in the Office Action amounts to mere speculations and not substantiated by Nelson's disclosure as required under 35 U.S.C. § 102(e)/103(a).

For at least these exemplary reasons, claim 1 is patentably distinguishable (and is patentable over) Nelson. Accordingly, Applicant respectfully requests that the Examiner withdraw this rejection of claim 1 and its dependent claims 2-5, 9, and 10.

In addition, Applicant respectfully notes that claim 10 recites: "wherein the isochronous cycle comprises of two time portions, cyclical exchange of non real time data and cyclical

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exchange of real-time data, wherein the first and second data telegrams are real time data, wherein paths of the network are broken up not to form a ring for the non real time data using Spanning-Tree-Algorithm.” The Examiner simply alleges that these features are inherent since Nelson discloses that the communication link may be Ethernet (*see* pages 13-14 of the Office Action). Applicant respectfully disagrees.

Under the doctrine of “inherency,” if an element is not expressly disclosed in a prior art reference, the reference will still be deemed to anticipate a subsequent claim if the missing element “is necessarily present in the thing described in the reference” *Cont'l Can Co. v. Monsanto Co.*, 948 F.2d 1264, 1268, 20 U.S.P.Q.2d 1746, 1749 (Fed. Cir. 1991). “Inherent anticipation requires that the missing descriptive material is ‘**necessarily present,’ not merely probably or possibly present,** in the prior art.” (emphasis added) *Trintec Indus., Inc. v. Top-U.S.A. Corp.*, 295 F.3d 1292, 1295, 63 U.S.P.Q.2d 1597, 1599 (Fed. Cir. 2002); see also MPEP §2112. Nelson discloses that the communication link may be Ethernet. Clearly, there is no inherent disclosure of the above-noted unique features of claim 10 at least because these features are not necessarily present in the communication link in Nelson. Furthermore, these features are not necessarily present in every Ethernet network disclosed in Nelson. For at least these additional exemplary reasons, claim 10 is patentably distinguishable from Nelson.

Next, independent claims 6-8 recite features similar to, although not necessarily coextensive with, the features argued above with respect to claim 1. Therefore, arguments presented with respect to claim 1 apply with equal force here. For at least substantially analogous exemplary reasons, therefore, independent claims 6-8 are patentably distinguishable from (and are patentable over) Nelson.

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V. Conclusion

In view of the above, reconsideration and allowance of this application are now believed to be in order, and such actions are hereby solicited. If any points remain in issue which the Examiner feels may be best resolved through a personal or telephone interview, the Examiner is kindly invited to contact the undersigned attorney at the telephone number listed below.

The USPTO is directed and authorized to charge all required fees, except for the Issue Fee and the Publication Fee, to Deposit Account No. 19-4880. Please also credit any overpayments to said Deposit Account.

Respectfully submitted,

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